Swiss Constitutional Law DRAFT

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1st Constitution

a) History and Overview

Until 1848, the ancient Swiss cantons formed a rather loose confederation. The cantons were sovereign states, tight together by treaties. A typical example was the Confederate Treaty of 1815 which was agreed by the cantons under pressure from the then predominant European powers during the reorganisation of Europe at the Congress of Vienna. At the same time, the other European states recognised the borders of the Swiss confederation and her neutrality. In 1847, a civil war broke out in which the (predominantly liberal) protestant cantons fought against the (predominantly conservative) catholic cantons. The former considered the *Sonderbund*, which the latter had founded, to violate the Confederate Treaty. The protestant cantons prevailed, and the *Sonderbund* was dissolved.

In the aftermath of the civil war, Switzerland was founded. In 1848, the new constitution was put in force although various cantons – mainly those which had been defeated in the civil war – originally opposed its content and the creation of a new federation. The new constitution created a modern federal state, whereby enumerated policy areas fall under the competence of the federal level, while leaving the regulation of all the other policy areas to the cantons. It strengthened democratic structures and fundamental rights. It introduced the organisational pattern of checks and balances on the federal level by introducing the Federal Assembly, the Federal Council and the Federal Supreme Court. In part, the new constitution was visibly inspired by the US constitution and the achievements of the French revolution.[1]

In 1874, the constitution was completely revised. A major novelty was the introduction of an optional legislative referendum; citizens could request a binding vote on federal acts which the parliament planned to enact. The Federal Supreme Court was established as a permanent court. The army was unified. New fundamental rights, such as economic freedom and the right to free primary school education, were introduced; others were extended, such as the right of domicile. Between 1874 and 1999, the constitution was revised many times. The competences of the federal level were gradually enhanced. In 1891, the right of the citizens to propose a revision of the constitution was introduced. In 1978, the Canton Jura was founded, becoming the 26th canton. As late as in 1971, the women were granted full political rights in federal matters.

In 1999, the constitution was again completely revised. The prime objective was to update and improve the text, without introducing substantial changes. The new text was

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1 FLEINER/MISIC/TÖPPERWIEN, n. 13; HALLER, n. 2, 20-21.

put into force in 2000, after a majority of the people (59% of those turning up to vote) and a majority of the cantons (12 cantons, two half-cantons) had approved it.[2] It contains all elements which are typical of a modern constitution of a federal state:

- Title 1 defines the main features of the Swiss Confederation, by listing the 26 cantons which form – together with the people – the Confederation, by setting out the aims, in particular to protect the liberty and rights of the people and to safeguard the independence and security of the country, by determining German (which speak 63.5% of the inhabitants as main language), French (22.5%), Italian (8%) and Romansh (0.5%) as national languages and by highlighting the relevance of the rule of law (Articles 1-6 Cst.).
- Title 2 grants fundamental rights and defines Swiss citizenship (Articles 7-41 Cst.).
- Title 3 delineates the competences of the federation from the competences of the cantons and communes, by enumerating the competences which the federal level enjoys, and defines the financial system, including taxation (Articles 42-135 Cst.). This part is, by far, the most voluminous; it encompasses 94 articles.
- Title 4 grants political rights in federal matters, in particular the right to participate in elections to the National Council and in popular votes (initiatives and referenda) and to launch or sign popular initiatives and requests for referenda (Articles 136-142 Cst.).
- Title 5 regulates the organisation and competences of the main federal authorities, namely the Federal Assembly, the Federal Council and the federal administration, the Federal Supreme Court and the other judicial authorities (Articles 143-191c Cst.).
- Title 6 sets out the procedure for the revision of the constitution, in particular the requirement that the people and the cantons must agree. A revision can be initiated by the federal authorities or the people (popular initiative). Title 6 also contains transitional provisions (Articles 192-197 Cst.).

In addition, constitutional law and practice in Switzerland is influenced by international law which might also encompass rules of constitutional relevance. This holds true, in particular, with respect to international human rights guarantees and some of the bilateral agreements with the EU. Interpreting Swiss law, including the constitution, in conformity with international law is a well-established method of interpretation, supplementing the classical canon of methods of interpretation. Although Switzerland has traditionally been friendly towards international law, the constitution continues to follow the introverted tradition of constitutionalism and fails to properly reflect Switzerland's participation in global and European organisations and treaty networks (s. the chapter on international relations).

b) Citizenship and Foreign Nationals

Switzerland has 8'400'000 inhabitants. 6'300'000 inhabitants are Swiss citizens. The others, *i.e.*, 25% of the population, are foreign nationals (not including asylum seekers). Moreover, more than 300'000 persons commute across the borders to and from Switzerland, often on a daily basis. 770'000 Swiss citizens live abroad.

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[2] S. for an English version www.admin.ch/opc/en/classified-compilation/19995395/index.html.

aa) Citizenship

Citizenship in Switzerland is based on the concept that a citizen has three citizenships: communal, cantonal and Swiss (Article 37 Cst.). These citizenships are connected. In particular, Cantonal and communal citizenships are prerequisites of Swiss citizenship. Double citizenship, *i.e.*, Swiss citizenship in addition to the citizenship of another country, is permitted under Swiss law.

Citizenship can be acquired by law or by naturalisation. The prerequisites for the acquisition are defined partly by federal law (mainly minimum requirements), partly by cantonal law (Article 38 Cst.); with respect to federal law, the Federal Act on the Swiss Citizenship is relevant:

- Swiss citizenship is acquired by law, *i.e.*, automatically, by children who have one parent with a Swiss citizenship; these children also attain the Swiss parent's cantonal and communal citizenship. Thereby, Switzerland follows the principle of *ius sanguinis*. A child who is adopted acquires Swiss citizenship of the adopting Swiss parent.
- Swiss citizenship is acquired by naturalisation, *i.e.*, by an official decree, when an applicant fulfils the relevant requirements as provided for in federal and cantonal law. With respect to federal law, an applicant must demonstrate that he or she has been successfully integrated into the Swiss society, abiding by Swiss law and accustomed to Swiss habits and practices, that he or she is able to communicate in one of the national languages and that he or she has resided in Switzerland for a certain period of time (usually ten years for adults). In addition, the cantons usually require that an applicant has resided in the canton and commune for a certain period of time and that he or she speaks one of the canton's official languages. In various cantons, the decision to grant citizenship has traditionally been taken by communal assemblies or, even more problematic in light of fundamental rights, by the electorate in secret ballot votes (3. b). A simplified procedure for naturalisation applies to certain foreign nationals, in particular to spouses of Swiss citizens. In 2017, the people and the cantons voted in favour of a new constitutional provision according to which the federal authorities shall enact simplified regulations on the naturalisation of third generation immigrants (Article 38[3] Cst.).

Swiss citizenship is the prerequisite for various rights and duties. On the federal level, the following are the most relevant:

- Swiss citizens over the age of 18 enjoy political rights. They have the right to participate in elections to the National Council and in popular votes (initiatives and referenda) and to launch or sign initiatives and requests for referenda (Article 136 Cst.). Swiss citizens might profit from the freedom of domicile in Switzerland (Article 24 Cst.), from the protection against expulsion, extradition and deportation (Article 25 Cst.) and from diplomatic protection abroad.
- Swiss men have a duty to render military service; for women, military service is voluntary (Article 59 Cst.).

Swiss citizenship can be lost by law, *i.e.*, automatically, or by an official decree. It is lost by law, for instance, when a Swiss was born and has lived abroad, possesses another citizenship and does not declare that he or she wants to maintain the Swiss citizenship. It is lost by an official decree, for instance, when a Swiss citizen who possesses

another citizenship seriously violates the interests and reputation of Switzerland. These rules are based on the principle that statelessness shall be avoided.

bb) Foreign Nationals

Switzerland has traditionally been a country with a high percentage of people who live and work in the country but do not possess Swiss citizenship. Various factors might explain this. The economic prosperity of the country has led to a high demand for manpower from abroad. Moreover, the fact that EU foreigners enjoy substantial rights based on the Agreement on the Free Movement of Persons between Switzerland and the EU reduces the incentive for such people to be naturalised. Lastly, the restrictive naturalisation policy in Switzerland means that even persons who have lived in the country for decades do not necessarily meet the conditions for naturalisation.

Article 121 Cst. confers the competence to legislate on immigration and asylum to the federal authorities. Based thereupon, the Federal Act on Foreigners regulates entry to, residence in and departure from the country. Over the last decades, various popular initiatives have aimed at implementing a more restrictive policy vis-à-vis foreign nationals. In 2010, for instance, the people and the cantons approved the initiative "for the expulsion of criminal foreign nationals" ("für die Ausschaffung krimineller Ausländer") according to which foreign nationals who have committed one of the enumerated crimes – such as homicide, rape and robbery – or who have improperly claimed social insurance or social assistance benefits lose the right of residence automatically and must be deported (Article 121[3-6] Cst.). The Federal Assembly did not implement the initiative literally; in particular, it included a hardship clause. In 2016, the people and the cantons rejected the initiative "enforcing the expulsion of criminal foreign nationals" ("Zur Durchsetzung der Ausschaffung krimineller Ausländer") which demanded a strict implementation of the original initiative. In 2014, the people and the cantons approved the initiative "against mass immigration" ("Gegen Masseneinwanderung"). According to the new provisions, Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market (Articles 121*a* and 197[11] Cst.; s. the chapter on international relations).

Foreign nationals do not enjoy political rights on the federal level. This is problematic as these people – ¼ of the population – are henceforth excluded from the democratic process. At least, some cantons and communes do grant political rights to foreign nationals. Illustratively, the cantons of Jura and Neuchâtel grant foreign nationals, under certain conditions, the right to vote at cantonal and communal levels.

c) Fundamental Rights

The constitution contains an impressive catalogue of fundamental rights, starting with human dignity and followed by all other rights which are usually found in modern European constitutions: equality before the law and the prohibition of discrimination on the grounds of, *inter alia*, origin, race, gender and age, the protection against arbitrariness, good faith, civil liberties and freedoms, political rights, basic procedural rights and basic social rights (Articles 7-34 Cst.). Pursuant to Article 35 Cst., fundamental rights must be respected throughout the entire legal system. Individuals can invoke them before state authorities. Private persons are bound by fundamental rights when they exercise a state function. Fundamental rights must be taken into account, where appropriate,

in relationships between individuals. This includes the obligation to interpret Swiss law in its entirety in light of fundamental rights (indirect third-party effect). Article 36 Cst. makes it clear that the guaranteed rights do not apply in an absolute manner. Restrictions are lawful as long as, cumulatively, they have a legal basis, are justified by a public interest, are proportionate and do not violate the essence of the right in question.

In addition to the federal constitution, fundamental rights are guaranteed in cantonal constitutions and in international treaties:

- The constitutions of the cantons also contain fundamental rights. In some cases, they go beyond of what is guaranteed by the federal constitution. For instance, the constitution of the Canton of Zurich guarantees, in its Article 15, the right to found, to organise and to attend private educational institutions.
- International treaties are highly relevant for the protection of fundamental rights in Switzerland. First and foremost, the European Convention on Human Rights (ECHR) has been attributed, by the Federal Supreme Court, a quasi-constitutional status.[3] Other international treaties, such as the UN Covenant on Economic, Social and Cultural Rights, the UN Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination, complement the protection guaranteed by the ECHR. Moreover, the comparative law method of interpretation has traditionally been instrumental in further developing fundamental rights in Switzerland; law and practice in particular in Germany, the United States and the EU have markedly influenced fundamental rights protection in Switzerland.

The Federal Supreme Court did not hesitate to recognise fundamental rights which were not explicitly provided for in the constitution of 1848/1874, thereby recognising the existence of unwritten rights. Examples were the freedom of expression (1961, now Article 16 Cst.), the freedom of assembly (1970, now Article 22 Cst.) and the right to assistance when in need (1995, now Article 12 Cst.).[4] It is conceivable that the Federal Supreme Court might again recognise guarantees which are not (yet) enshrined in the constitution of 1999 if such a step suggests itself in light of new challenges and threats.

Individuals can invoke fundamental rights as guaranteed by the federal constitution before administrative authorities and courts. This holds true for cases in which cantonal laws and decisions are reviewed. Similarly, it is possible to challenge decisions based on federal ordinances as to their compatibility with fundamental rights. However, Article 190 Cst. provides that the Federal Supreme Court and the other judicial authorities apply federal acts and international law. Therefore, there is no possibility for the courts to declare federal acts which are not compatible with fundamental rights guaranteed by the federal constitution, invalid (2.c.).

d) Federation, Cantons, Communes

Federalism is a basic constitutional principle in Switzerland. The competences and responsibilities are vertically distributed among the three levels of government, namely the federation, the cantons and the communes (municipalities). The latter enjoy consid-

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3 BGE 117 Ib 367.

4 BGE 87 I 114; BGE 96 I 219; BGE 121 I 367.

erable autonomy in regulating their own affairs, profiting from the principle of subsidiarity (Article 5*a* Cst.). Thereby, the identity-creating societal, linguistic and cultural diversity throughout the country is preserved. The people are encouraged to actively participate in political debates and decision-making also on the cantonal and communal level. The federal bicameral parliamentary system ensures that the cantons participate in the law-making process on the federal level (1.e.). They are also involved in the process of revising the federal constitution; a revision must not only be approved of by a majority of the people but also by a majority of the cantons. Overall, the Swiss federal system displays a unique "bottom-up" character.[5] At the same time, it is acknowledged that the federal level and the cantons shall cooperate and support each other in the fulfilment of their duties (Article 44; cooperative federalism). An essential element thereof is the use of national equalization payments, both between the cantons and between the federation and the cantons, which contribute to the promotion of internal cohesion (Article 2[2] Cst.). In 2017, these payments amounted to almost CHF 5 billion.[6]

The characteristic features of the three levels of government are the following:

- The federation is composed of the people and the cantons (Article 1 Cst.). The federal level possesses the competences which are assigned to it by the constitution (Article 42 Cst.). They are enumerated mainly in Articles 54-125 Cst. Federal law takes precedence over cantonal and communal law (Article 49 Cst.). This holds also true for federal acts which have been enacted even though the constitution does not provide for a competence (s. for the lack of constitutional review of federal acts 2.c.).
- 26 cantons form the second level of government (23 cantons, six half-cantons). In 1978, the Canton of Jura, whose territory formerly had been part of the Canton of Berne, was founded, complementing the original 25 cantons. Attempts to merge the two half-cantons of Basle-City and Basle-Land into one canton have not materialised; in 2014, the people of Basle-City voted strongly in favour of such a merger, but the people of Basle-Land strongly rejected it. Zurich is the canton with the biggest population with 1'4600'000 inhabitants; the Canton of Appenzell Innerrhoden is the smallest, counting 16'000 inhabitants. All cantons are equal with respect to their legal status, with the exception that half-cantons have only one seat in the Council of Cantons (Article 150) and count only as ½ when a majority of the cantons is required for a revision of the constitution (Article 142 Cst.). The cantons possess all competences which have not been assigned to the federal level (Articles 3 and 42 Cst.), including the implementation of federal law (Article 46 Cst.). They enjoy considerable autonomy in organising themselves and regulating their own affairs; the federal level ensures that the cantons have sufficient financial resources to do so (Article 47 Cst.). Two or more cantons can conclude inter-cantonal agreements (Article 48 Cst.).
- Some 2'290 communes form the third level of government. The number is declining as there is an ongoing trend that communes merge in order to carry out their tasks more efficiently. As with cantons, their population and size differ greatly. The Commune of Zurich is the biggest, counting almost 400'000 inhabitants; the Commune of Bister (Canton of Valais) is the smallest, counting 31 inhabitants. The autonomy of the communes, the scope of which is determined by the cantons, is explic-

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5 HALLER, n. 92; s. also FLEINER/MISIC/TÖPPERWIEN, n. 289.

6 Federal Department of Finance, Factsheet: National Fiscal Equalization (NFA) 2017, https://www.efd.admin.ch/efd/de/home/themen/finanzpolitik/nationaler-finanzausgleich.html.

itly guaranteed (Article 50 Cst.). Within the limits of their autonomy, the communes organise decision-making in communal matters, such as local taxes, local police, primary education and planning of land use, themselves.

Over the last decades, the federal system has increasingly come under pressure. First, there has been an ongoing shift of competences from the cantons to the federal level.[7] Second, the tendency to take recourse to international treaties more often results in a tacit neutralisation of cantonal competences. The bilateral agreements with the EU are examples to the point. Accordingly, consultation and cooperation between the different layers of government are even more important today than they were in the past. Third, the principle that all cantons have an equal standing in votes on the revision of the constitution collides with the principle that all Swiss citizens are equal and have one vote. A citizen of the Canton of Appenzell Innerrhoden possesses a voting power which is 38 times higher than the voting power of a citizen of the Canton of Zurich. As problematic as it might be, this inequality is a consequence of the deliberate choice to create Switzerland as a federation, consisting of the people and the cantons.

e) Federal Assembly, Federal Council, Federal Courts

The federal level is organised according to the classic principle of separation of powers between the different branches of government (checks and balances). At the same time, they cooperate and even depend on joint action, as provided for by the constitution. The composition and functions of the Federal Assembly, the Federal Council (including the federal administration) and the Federal Supreme Court and other federal judicial authorities are as follows (s. for two particularities, namely the right of the people to have the last word on federal acts and international treaties and the Federal Council being organised as a multi-party collegiate body 2. a) and 2. b):

– The Federal Assembly is the legislature (Articles 148-173 Cst.). It is a bicameral parliament, consisting of the National Council and the Council of States. The National Council has 200 members, representing the people. The seats are allocated to the cantons in proportion to their population. Currently, the Canton Zurich has 35 seats; six cantons, among them the Canton of Appenzell Innerrhoden, have the minimum of one seat. In each canton, the elections take place on the basis of proportional representation. The Council of States consists of 46 members, *i.e.*, two delegates from each canton (whereby half-cantons delegate one person), representing their cantons. The elections of the cantonal delegates are governed by cantonal law; in most cantons, majority voting applies. The terms of office for both chambers are four years; re-elections are possible. The two chambers are equal and have similar powers. In particular, both chambers must agree on the enactment of federal acts and the conclusion of international treaties as well as on the adoption of the budget. The members of both chambers act together, as United Federal Assembly, when they elect the members of the Federal Council, the members of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces.
– The Federal Council is the highest governing and executive authority (Articles 174-187 Cst.). It consists of seven members (councillors) which are elected individually by the Federal Assembly for a term of four years. Re-elections are possible and usu-

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7 HALLER, n. 65.

ally a matter of routine; only in four cases since 1848, councillors have not been re-elected.[8] The United Federal Assembly must ensure that the various geographical and linguistic regions of the country are appropriately represented. Moreover, all major political parties are represented (2. b). In 2013, the people and the cantons did not approve the initiative "popular election of the Federal Council" ("Volkswahl des Bundesrates") demanding that the councillors shall be elected directly by the people. One of the councillors acts as "President of the Confederation", chairing Federal Council meetings and fulfilling representation duties in the country and abroad for a term of one year, acting as *primus* or *prima inter pares*. The Federal Council takes its decisions as a collective body, endorsing the principle of collegiality. It directs the federal administration whereby each councillor heads one of the seven Departments. The Federal Council decides on the objectives of government policy, thereby deploying political leadership. It submits drafts of federal acts to the Federal Assembly, enacts ordinances and is responsible for foreign relations.

– The Federal Supreme Court is the supreme judicial authority of Switzerland (Articles 188-191*b* Cst.). Currently, it consists of 38 full-time judges and 19 part-times judges which work in seven court divisions dealing with civil law, penal law, public law and social law. They are elected by the United Federal Assembly for a term of six years; re-election is possible and, if aspired, regularly achieved. The Federal Supreme Court acts upon appeal, hearing cases which have been decided either by the highest cantonal courts or by other federal courts, *i.e.*, by the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court (s. for the limited constitutional review 2.c.). The independence of the courts is constitutionally guaranteed.

The members of the Federal Assembly, the Federal Council and the Federal Supreme Court are generally members of political parties. In the Federal Assembly, the most powerful parties are the Swiss People's Party (SVP) with 70 seats, the Social Democratic Party (SPS) with 56 seats, the Liberals (FDP) with 45 seats and the Christian Democratic People's Party (CVP) with 40 seats. These four parties are represented in the Federal Council (2. b). The federal judges are also elected on the basis of party membership. The combination of party membership with the relatively short term of office of six years means that federal judges are under more scrutiny than judges in other jurisdictions with longer terms of office but without periodic re-elections.

2. Principles

The Swiss political system is characterised by various particularities which distinguish it from theoretical models and from political systems which have been developed in other states. The following particularities are most noteworthy.

a) (Semi-) Direct Democracy

Swiss citizens are regularly called upon to vote on political issues. Their decisions are legally binding and cannot be overturned by state authorities. On the federal level, popular initiatives and referenda are the relevant instruments. Accordingly, the Swiss system if often termed a semi-direct democracy, mixing elements of a representative

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8 HALLER, n. 300.

system with strong direct democratic elements. In addition, the cantons and communes are free to set up their own systems of direct participation of the people.

aa) Popular Initiative

A popular initiative allows citizens to request a vote on a revision of the constitution (Articles 138-139*b* Cst.). This right was introduced in 1891. Then, 50'000 citizens were required to sign an initiative. In 1976, the period to collect the signatures was limited to 18 months. In 1977, the number of signatures was raised to 100'000. The constitution leaves it to the authors of an initiative to propose a revision in general terms or to submit a specific draft of provisions. In practice, specific drafts are the norm. The constitution does not set any hurdles for proposing new provisions, except that peremptory norms of international law must not be violated (*ius cogens*) and, in case of a partial revision, that the principle of unity of form and subject-matter is respected. The authors of an initiative are free to choose an appropriate title as long as it is not misleading. Accordingly, authors tend to label initiatives with lurid titles in order to sell them on the political market. An illustrative example was the initiative "against rip-off" ("gegen die Abzockerei", 2013) which was approved of by the people and the cantons.

Traditionally, popular initiatives have been launched by minorities on issues which the established political parties do not want to take up in parliament. In recent years, there is an increasing tendency that established political parties take recourse to initiatives themselves, bypassing the classic parliamentarian process. Moreover, initiatives can be launched by interest groups to bring a specific concern to the attention of the public, thereby exerting pressure on the political parties to deal therewith. The constitution provides for the possibility that the Federal Assembly submits a counter-proposal to an initiative; if this is the case, the committee responsible for the initiative might withdraw the initiative, and only the counter-proposal – considered to be riper for approval – is submitted to the vote of the people and the cantons. The Federal Assembly might also envisage the enactment of a federal act (indirect counter-proposal), taking up the objectives of the initiative, and again, the initiative committee might withdraw the initiative.

The people and the Cantons have become more willing to approve popular initiatives over the last one and a half decades. Out of all 22 initiatives which were approved of since 1871, ten initiatives were approved of since 2002. Among them were various initiative texts which were, with a view to their unambiguous wording, not compatible with international law. This is problematic (s. the chapter on foreign relations).

bb) Referendum

A referendum allows citizens to vote on a constitutional revision, a federal act or an international treaty (Articles 140-142 Cst.). Two types are provided for:

- A mandatory referendum takes places automatically, *i.e.*, without any action taken by the authorities or the people, in the case of constitutional revisions, of accessions to organisations for collective security (*e.g.*, NATO) or to supranational communities (*e.g.*, the EU) and of emergency acts not based on a constitutional provision. Such referenda need a majority of the people who vote and a majority of the cantons in order to be approved of.
- An optional referendum can be requested by 50'000 citizens against, in particular, the enactment of a federal act (introduced in 1874) and the conclusion of an interna-

tional treaty of certain significance (introduced in 1921, extended in 1977 and 2003). Originally, the necessary number of signatures was 30'000. In 1977, the number was increased to 50'000. The signatures must be collected within 100 days of the official publication of the act or treaty. Decisive for the outcome of the vote are the people; it is not necessary that also a majority of the cantons approves the act or the treaty.

Since 1874, citizens have been successful in collecting the necessary number of signatures for requesting an optional referendum in 183 cases. In 79 votes, the people agreed to put in force the act or treaty in question. In 104 votes, the outcome was negative, and the act or treaty was not put in force as envisaged by the Federal Assembly.

The referendum modifies the representative system. It is the main instrument of control of, and opposition against, the Federal Assembly; to some extent, the possibility to launch an optional referendum compensates for the lack of a fully-fledged parliamentarian opposition.[9] The Federal Council and the Federal Assembly envisage legislation which takes into account the concerns of as many political parties and stakeholders as possible, thus enhancing the chance that the final product "survives" a possible referendum. Against this background, it becomes clear why the Swiss "referendum democracy" is often referred to as "consensus-oriented democracy".[10]

cc) "Landsgemeinde" as Cantonal Particularity

The cantons have chosen their own models for the participation of their citizens in the political process. A particularity is provided for in the Cantons of Appenzell Innerrhoden and Glarus which have determined the Landsgemeinde as their main decision-making body. Once a year, the cantonal citizens eligible to vote gather on the main town square in the respective capitals, Appenzell and Glarus, and decide on all relevant matters, including revisions of the cantonal constitutions, the enactment of cantonal laws and elections. Pending issues are openly debated. Votes and elections are practiced in public, by raising hands. Usually, the votes are estimated by the chairman or chairwoman. Only in exceptional cases, the votes are counted individually.

From a legal viewpoint, the Landsgemeinde poses various problems. Open voting contradicts the right to submit a secret vote (Article 34 Cst.). Citizens who are unable to attend, such as elderly or ill people and people with professional duties, are excluded from exercising their political rights. This is problematic. Still, the Federal Supreme Court held that these restrictions do not amount to a violation of the federal constitution, "in spite of deficiencies inherent in the system".[11]

b) Multi-Party Government

Most European countries adhere to a parliamentary system of government whereby the prime minister and his or her government depend on the support of the parliament.[12] The strongest party selects the prime minister and forms the government, if necessary together with other parties as a coalition.

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9 HALLER, n. 7.
10 EGLI, p. 64; FLEINER/MISIC/TÖPPERWIEN, n. 26, 98; HALLER, n. 227.
11 BGE 121 I 138.
12 HALLER, n. 238-239.

In Switzerland, another approach has been developed over time. During the first decades of the confederation, the Federal Council was composed only of members of the Liberals (FDP). In the aftermath of the introduction of the referendum and the popular initiative for a partial revision of the constitution, the pressure grew also to include members of other parties. Therefore, in 1891, the first member of the Christian Democratic People's Party (CVP) was elected. In 1929, the first member of the Party of Farmers, Traders and Independents (BGB), the predecessor of the Swiss People's Party (SVP), became councillor. In 1943, the Social Democratic Party (SPS) was represented in the Federal Council for the first time. Since then, it has been a Swiss particularity that all major political parties are represented in the Federal Council. To this effect, in 1959, the so-called magic formula was established. According to this formula, the Federal Council was set up by two members of the Liberals (FDP), the Social Democratic Party (SPS) and the Christian Democratic People's Party (CVP) and of one member of the Swiss People's Party (SVP). The distribution reflected, approximately, the number of seats which the parties used to gain in the general elections. In 2003, the formula was slightly modified. The Swiss People's Party (SVP) has gained a seat, now having two members in the Federal Council (partly interrupted between 2007 and 2015 when elected members of the SVP chose to leave the party and to join a newly founded party, the Conservative Democratic Party [BDP]), to the detriment of the Christian Democratic People's Party (CVP) which has had only one seat since then. Both the Liberals (FDP) and the Social Democratic Party (SPS) still have two seats each.

The magic formula reflects a tacit agreement between the major parties that a collegiate system of a multi-party government suits the interests of Switzerland best. In particular, this practice ensures that the Federal Council prepares legislative drafts in a way so that they find a majority in the Federal Assembly and also might "survive" a possible referendum as members of all major parties can influence the drafting from the scratch. The collegiate system of a multi-party government is an essential part of the Swiss "concordance democracy"[13].

However, there is no legal obligation on the part of the Federal Assembly to elect councillors according to the magic formula. With each election of a new councillor, the pros and cons of the Swiss model are discussed, and the public watches the fascinating hectic in the Federal Palace with interest. It seems likely that the magic formula will continue to form the basis for the composition of the Federal Council, albeit, perhaps, more readily adapted to actual developments than was the case in the previous decades.[14]

c) Limited Constitutional Review

Constitutional review, *i.e.*, the review by courts of legal acts and decisions as to their compatibility with the constitution and to declare them, if found to be incompatible, invalid, is a characteristic feature of most European legal systems. In Switzerland, however, the courts, including the Federal Supreme Court, are not assigned with this function, at least not with respect to federal acts. Pursuant to Article 190 Cst., the Federal Supreme Court and the other judicial authorities apply the federal acts and international law. Therefore, the courts are obliged to apply federal acts even though they might vio-

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13 HALLER, n. 227; EGLI, p. 95.

14 S. also FLEINER/MISIC/TÖPPERWIEN, n. 210.

late the constitution. In essence, it is the Federal Assembly which interprets the constitution authoritatively in the process of enacting federal acts. This includes the assessment as to whether federal acts are compatible with fundamental rights and whether the Federal Assembly is empowered to enact legislation in a specific policy field. This allocation of competence and responsibility is based on a deliberate systemic choice, approved of by the people and the cantons. Attempts to introduce the right of the judiciary to hear cases on the constitutionality of federal acts, for instance by simply deleting Article 190, have repeatedly failed to gain enough political support.

The Federal Assembly is well advised to take its role as final interpreter of the constitution seriously, assisted by the Federal Council and the legal specialists in the federal administration which prepare drafts and accompany the decision-making process. This holds in particular true with respect to the protection of fundamental rights. In fact, it is not easy to point to federal acts evidently violating fundamental rights. At the same time, the problematic aspects of the system are obvious. The Federal Assembly, acting by majority voting, is not ideally suited to guarantee fundamental rights. At least, the following aspects of the case law of the Federal Supreme Court contribute to minimise the deficiencies of the current system:

– The Federal Supreme Court consistently interprets federal acts in light of fundamental rights, thereby adhering to the generally applicable method to interpret the law in conformity with the constitution.
– The Federal Supreme Court does not refrain from pointing to existing incompatibilities if it is not possible to interpret federal acts in conformity with fundamental rights. Therewith, the Federal Supreme Court calls upon the Federal Assembly to remedy the identified deficiencies.
– The Federal Supreme Court accepts cases in which it is called upon to review federal acts in light of the ECHR. The possibility to invoke the ECHR is a surrogate for the lack of constitutional review of federal acts. At least with respect to the rights guaranteed in the ECHR, individuals can seek judicial review of federal acts.

The Federal Supreme Court is competent to review cantonal laws and decisions as to their compatibility with the federal constitution. Various *causes célèbres* of the Federal Supreme Court concerned such constellations and have led to the development of an impressive case law on fundamental rights (3. a) and b). Indirectly, this case law again influences the law-making process on the federal level.[15] Moreover, it is possible to challenge decisions based on federal ordinances as to their alleged incompatibility with the constitution.

3. Landmark Cases

a) Women's Suffrage (Federal Supreme Court)

In 1989, Theresa Rohner requested the cantonal authorities to determine that she was allowed to participate at the Landsgemeinde of the Canton Appenzell Innerrhoden in order to exercise her political rights. The cantonal authorities rejected her application. They argued that Article 16 of the constitution of the Canton Appenzell Innerrhoden did

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15 HALLER, n. 569.

not grant political rights to women; only men could vote and participate in elections. In 1990, the Landsgemeinde dealt with a proposal to change the cantonal constitution according to which the political rights would have been extended to all Swiss citizens residing in the Canton. However, the Landsgemeinde rejected the proposal. Several applicants, among them Ursula Baumann and Mario Sonderegger, challenged the decision of the Landsgemeinde. They requested the Federal Supreme Court to annul it and, instead, to oblige the canton to introduce women's suffrage.

Upon appeal, the Federal Supreme Court followed the arguments of the applicants.[16] It determined that the exclusion of women from the cantonal electorate violated Article 4(2) of the Constitution of 1874 (Cst. 1874). This article was introduced in 1981 and provided for equal treatment of men and women (now: Article 8[2] Cst.). According to the Federal Supreme Court, the principle of equal treatment also applied to political rights at the cantonal level. The Federal Supreme Court concluded that the cantonal practice not to allow women to participate at the Landsgemeinde violated Article 4(2) Cst. 1874. Article 74(4) Cst. 1874, according to which it was up to the cantons to regulate the exercise of political rights at the cantonal level, did not change this result as it did not explicitly provide for an exception from the principle of equal treatment (now: Article 39[1] Cst.). Consequently, the Canton of Appenzell Innerrhoden was obliged to allow women to participate at the Landsgemeinde and to exercise the political rights which the cantonal law provided for. The Federal Supreme Court concluded that it was possible to interpret Article 16 of the constitution of the Canton of Appenzell Innerrhoden to this effect; it was not necessary for the canton to formally change its constitution.

The decision rendered by the Federal Supreme Court ended the long fight of Swiss women (supported by, at least, some men) for equal treatment with respect to political rights. On the federal level, the women had been granted full political rights in 1971, based on a constitutional revision approved of by a majority of the people – namely, 65% of the men who turned up to vote – and a majority of the cantons (Article 74[1] Cst. 1874, now Article 136[1]). The Canton of Appenzell Innerrhoden was the last canton to follow suit. Irritatingly, the (male) electorate of the canton was not ready to introduce women's suffrage itself. Rather, the Federal Supreme Court needed to step in.

b) Naturalisation and Fundamental Rights (Federal Supreme Court)

In 2000, the electorate of the Commune of Emmen (Canton of Lucerne) was called upon to decide on 23 applications for naturalisation (comprising 56 foreign nationals) in a ballot vote. The people voted in favour of the naturalisation of eight applicants which were all Italian citizens. They rejected all other applications which were mainly submitted by citizens of ex-Yugoslavian countries (some of which were born in Switzerland and had always lived here). Four of these applicants challenged the negative vote. The cantonal government council, the first appellate authority, rejected their complaints.

The Federal Supreme Court annulled the decision upon appeal.[17] It held that the electorate is a state organ and exercises a state function when it decides on the naturalisation of foreign nationals and thus on their legal status. Therefore, the electorate is obliged to

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16 BGE 116 Ia 359.
17 BGE 129 I 223.

respect fundamental rights (Article 35 Cst.). In particular, the prohibition of discrimination applies (Art. 8[2] Cst.). On the basis of how the electorate decided – naturalisation for all Italian applicants, no naturalisation for all applicants from ex-Yugoslavian countries without evident differences between the applicants – and publications in the run-up to the vote (flyers, letters to newspapers), the Federal Supreme Court decided that the prohibition of discrimination on grounds of origin was violated. Moreover, it held that the right to be heard applies; negative decisions must be motivated with an adequate reasoning (Article 29[2] Cst.). This right is violated *per se* in cases in which the electorate decides in secret ballot votes, as it is logically not possible to deliver a proper justification for a negative decision.

The Federal Supreme Court's judgment has been welcomed, and rightly so, by most commentators. In a series of later cases, the Federal Supreme Court has further refined the guidelines. It acknowledged that decisions on the naturalisation of foreign nationals can still be taken by the communal electorate if this is considered to be the appropriate forum; however, the decision-making process must respect fundamental rights, the most obvious ones being the prohibition of discrimination (Article 8[2] Cst.), the prohibition of arbitrariness (Article 9 Cst.), the right to privacy (Article 13 Cst.), the freedom of religion and conscience (Article 15 Cst.) and the right to be heard (Article 29[2] Cst.).[18] It has been estimated that communal electorates are still competent to decide on the naturalisation of foreign nationals in approximately 800 communes.[19]

In 2008, the Swiss People's Party (SVP) tried to turn the wheel back. It collected the necessary 100'000 signatures for a popular initiative "for democratic naturalisations" ("für demokratische Einbürgerungen) according to which it would have been entirely up to the communes to decide on the decision-making process for naturalisations. The people and the cantons overwhelmingly rejected the initiative. Instead, the Federal Assembly codified the basic elements of the Federal Supreme Court's case law in the Federal Act on the Swiss Citizenship (Articles 15-17).

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18 S., among others, BGE 129 I 232; BGE 130 I 140; BEG 135 I 49; BGE 139 I 169.

19 Neue Zürcher Zeitung am Sonntag (NZZaS), 23 July 2017, p. 17.

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